IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6635 OF 2004

M/s. Jayantilal Investments & Ors. ... Petitioners

Versus

Kashibai Govind Patel ... Respondent

Shri S.S. Shah i/b. Trupti Sanghvi i/b Bhutta and Associates for the Petitioners

Shri N.S.Shukla for Respondent

CORAM : S.R. SATHE,J.

DATED : 29/01/2007

P.C. :-

1. Rule, rule made returnable forthwith.

2. Heard the learned Advocate for the Petitioner as well as for Respondent.

3. The impugned order is in respect of rejection of the amendment application filed by the original plaintiff. Admittedly initially the suit was only for permanent injunction restraining defendants from obstructing the plaintiffs' possession of 3/4th portion of the suit property. It is the case of the plaintiffs that during the pendency of the suit the defendant made encroached to the extent of

remaining 3/4th portion and as such amendment was sought that the defendant be directed to hand over to the plaintiffs the possession of the suit property. The said prayer was opposed by the defendant.

3. After hearing both sides, the learned trial Judge dismissed the application holding that the relief claimed by the plaintiffs by amendment is in fact barred by law of limitation. However, firstly it must be noted that so far as encroachment to the extent of 3/4th portion is concerned, the plaintiffs have specifically averred that it is during pendency of the said suit. So far as the remaining 1/4th portion is concerned, there was some averment with regard to the Mutation Entry made in favour of the plaintiffs. That does not necessarily mean that plaintiffs had admitted that the defendant was in possession since the year 1988. The learned trial Judge has rejected the application for amendment on the ground that the relief claimed by the proposed amendment is barred by Law of Limitation and the proposed amendment will take away the defendant's valuable right.

4. Plaintiffs have specifically stated that the encroachment is made on 3/4th portion during the pendency of the suit. As it is no finding can be recorded at this stage that the claim with regard

to 1/4th portion of possession is barred by Law of Limitation. In fact the Apex Court has also observed in a case **Ragu Thilak D. John V/s S.Rayappan and Ors. (2001) 2 SCC 472** that where it is arguable that relief sought by way of amendment would be barred by law of limitation, still amendment should be allowed and the disputed matter be made as subject matter of an issue. So, bearing in mind the above observations and having regard to the main object of Order VI Rule 17 of CPC which is to avoid multiplicity of proceedings and minimise the litigation, I think that it was necessary to allow the amendment application of the plaintiffs. The order passed by the learned Judge is not legal and correct under the circumstances of the case.

5. Hence the order passed by the trial Judge is set aside. The plaintiffs are allowed to amend the plaint as alleged. The plaintiffs to carry out the amendment within one month from today. The defendant should be at liberty to file his additional written statement, if any, to the amended plaint. All issues including the issue with regard to limitation are kept open.

6. Rule is made absolute in the above terms.

(S.R.SATHE,J)